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The Railroad Rate Discrimination Provision of the Merchant Marine Act 1920

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RECENT legislation relating to the United States merchant marine has raised questions relating to the regulation of railroad rates in the interest of American shipping which are of much immediate importance. These questions are connected with the interpretation and administration of section 28 of the new shipping law.

Section 28 of the Merchant Marine Act of 1920 forbids rail carriers to quote export or import rates in connection with ocean vessels not documented under the laws of the United States which are lower than rates on like commodities, moving similar distances over the same route, in the same direction, but remaining exclusively within the United States. The law provides, however, in mitigation of the severe rule laid down in its opening sentences, that the Interstate Commerce Commission may suspend the operation of the act in the matter of export and import rates when the United States Shipping Board certifies to it the lack at specified ports of an adequate supply of American vessels to handle the business offering. The suspension is to continue until, in the opinion of the Shipping Board, the supply of American vessels has become adequate.

The first proposal for legislation of the character here summarized appears in section 30 of H. R. 10378 as reported to the Senate by Senator Jones, of Washington, in May, 1920. Mr. Dean, general counsel for the Shipping Board, says that this matter of discrimination in rates was brought to his attention in the middle of the year 1919, but that nothing was done at that time nor later, until Admiral Benson became a member of the Board. Indeed, a representative of the Seattle Chamber of Commerce who called upon Senator Jones as late as March, 1920, was told that, although some legislation with regard to export rates had been suggested, there was nothing of the sort in the pending Merchant Marine bill, and that the matter was dead. The same information was given to Mr. H. A. Dunn, of San Francisco.

When, in March, 1920, Admiral Benson became chairman of the Shipping Board, the situation changed. The new chairman was earnestly in favor of developing an American merchant marine. As a means to this end, he promptly decided that any discrimination which might be granted by railroads to export traffic should be limited to traffic which made use of American ships. To make his point of view effective, Admiral Benson had an amendment prepared, which he sent, with a letter strongly urging its adoption, to the Senate Committee on Interstate and Foreign Commerce. This was after the formal hearings on the Jones bill had been closed, but while the bill was still in conference. Mr. Dean discussed the amendment with Senator Jones, who thought well of it. The proposal was adopted first by the subcommittee in charge of the bill, then by the whole committee, and still later it was passed by Congress itself as section 28 of the Merchant Marine Act of June 5, 1920. Such is the history of this particular provision of the law.

The arguments in favor of section 28 are all based upon the assumption

that the time has come when federal assistance should be extended to an American merchant marine. Both Senator Jones and Admiral Benson have been outspoken on this point. The supporters of the measure were doubtless originally influenced by the fact that the Government possessed some seven million tons of shipping, which could neither be sold at an acceptable price nor be operated by the Government at a profit. This tonnage had not been acquired for commercial reasons, but it represented, none the less, a large investment on which it was desirable to earn a fair return. The fundamental justification for section 28, however, in the eyes of its original promoters was, unquestionably, their conviction that its effect would be to build up an American marine in private as well as in Government hands which would afford profitable employment for American capital, and would advance the interests of American foreign trade. In this respect, indeed, section 28 was only one of a number of provisions in the new law looking toward the protection of American shipping. Other sections in the Merchant Marine Act designed for the same purpose provided for the extension of the coastwise laws of the United States to the Philippine Islands, the repeal of the statute authorizing the admission of foreign-built vessels to American registry, and for the partial exemption of shipowners from income and excess profits taxes for ten years on condition that they annually invest in ship construction an amount equal to the taxes which they would otherwise have paid to the Government.

OBJECTIONS TO SECTION 28

It is natural that objections to section 28 should come from persons who oppose subsidy legislation as such. Yet this section is also vigorously opposed by those who believe in strengthening the American merchant marine but declare that an attempt by the method here proposed will fail in its purpose, or will succeed only after causing intolerable loss to certain geographical districts. Because of the necessary brevity of this discussion we will consider only objections of the second type.

On May 28, 1920, the San Francisco Chamber of Commerce wired a message to its representative in Washington, declaring that the merchants in San Francisco were emphatic and unanimous in the belief that no restriction of any nature or kind in reference to the flag carried by the ship or in direct reference to rail import and export rates should be imposed. The Chamber added, in explanation, that it felt that the operation of section 30 (section 28 in the law as finally enacted) would immediately divert tonnage from the Pacific Coast to eastern seaports and would also provoke retaliatory measures by foreign countries. This dispatch was followed by dispatches to other chambers of commerce in the Far West, and by the issuance of a questionnaire in June, which was circulated among trading and transportation companies in San Francisco, as well as among chambers of commerce north and south. Other coast cities gave similar prompt consideration to the pending legislation.

The result of this preliminary discussion, and of an active correspondence which accompanied it, was that it presently became the deliberate and official judgment of the merchants of San Francisco, Seattle, Tacoma, Portland and San Diego, that section 28 of the Merchant Marine Act would work to the injury of ports located upon the Pacific Coast in the following ways.

1. It would divert tonnage from western to eastern seaports.

2. It would divert tonnage from American to foreign ports.

3. It would provoke retaliatory legislation by foreign countries.

4. As a consequence of the dislocation of trade which would follow a reduced ocean tonnage and retaliatory legislation abroad, the application of section 28 would lead to a reduction in westbound freight movements over the transcontinental railroad lines which in time would produce a scarcity of cars for eastbound business, and possibly would make necessary an increase in local railroad rates.

The Pacific Coast cities thus took, in May and June, 1920, the position of active critics of the new law. Los Angeles, it may be added, did not join in this expression of opinion, but stated the view that American business men would prove able to control the routing of their exports, and that section 28 would have a desirable effect in encouraging American shipping.

I am inclined to doubt if the passage of the Jones bill will lead to damaging legislation on the part of foreign countries. It is true that the bill has already provoked caustic comment in the English press. The London *Fairplay*, for instance, terms the Merchant Marine Act, and section 28 of that act in particular, a direct attempt to drive other nations from the shipping business of the United States, and hints broadly that England will take corresponding action with respect to services which that country controls. It is clearly possible that some hostile legislation abroad will have to be encountered. On the other hand, the strong position of the United States in international trade, and the fact that section 28 treats all foreign nations without distinction, may be trusted to keep this reaction within bounds. Neither China nor the west coast of South America possesses important merchant marines which will impel either of them to reprisals upon the commerce of the United States, while countries which deal with the Atlantic seaboard of the United States at present suffer no handicap there from the new law. The principal marines to be affected in the near future are the Japanese and such of the English vessels as ply upon the Pacific; and opposition from these sources public opinion in the United States seems disposed to disregard.

RATE MAKING AND THE FAR WEST

With respect to the probable diversion of traffic from ports on the western seaboard, however, the Pacific Coast cities have made out a clear case, at least under present conditions as to supply of ships. To understand the situation, one must remember that export and import rate making is of more practical significance to the Far West than to any other part of the country, and that, accordingly, interference of any sort with export or with import rates has there a more far-reaching effect. In fact, there are no export rates in force on movements from the interior of the United States to the Atlantic seaboard outside of the longstanding differentials to Boston, Philadelphia and Baltimore; and while export rates are quoted to the Gulf cities, the differences between domestic and export rates are not so great on southern as on western hauls, nor are the rail distances so great in the South as they are in the West.

A very good illustration of the importance of western export rates may be found in the case of rates on iron and steel. Before the recent increase in charges, the rail rate from Pittsburgh to New York on iron and steel was 27 cents a hundred pounds, the ocean rate from New York to the Orient was 89 cents per hundred pounds; the com-

bined ocean and rail rate from Pittsburgh to the Orient was, therefore, $1.16. The domestic rate on iron and steel from Pittsburgh to Seattle was $1.37½, or 21½ cents in excess of the total charge from Pittsburgh to the Far East via New York. In order to secure some portion of the Pittsburgh export business, however, carriers west of Pittsburgh quoted an export rate of 60 cents per hundred pounds, which, added to an ocean rate of 60 cents, made a total of $1.20 per hundred pounds for the movement via the Pacific seaboard of the United States as against a rate of $1.16 via New York. Under this adjustment Seattle was able to handle $2,500,000 worth of iron and steel bound for the Orient during the first three months of 1920, as against some $13,000,000 worth which traveled via New York. It is perfectly evident, however, that except for the low export rate not a pound of export steel would have moved west from Pittsburgh.

The Portland Chamber of Commerce points out that what was probably intended when the authors of the Jones bill forbade carriers to quote export or import rates in connection with vessels not documented under the laws of the United States was that operators of foreign-owned vessels should be compelled to absorb the difference between domestic rates (which, under section 28, would obtain on exports or imports moving in foreign-owned vessels) and preferential export rates (which would continue to obtain on imports or exports moving in American-owned vessels) so as to enable American-owned vessels to compete advantageously with foreign-owned vessels. Foreign carriers can not, however, absorb a differential when it amounts to more than the entire ocean rate, and the result is likely to be, if section 28 is actively enforced, that foreign-owned vessels will abandon Pacific ports in favor either of Canadian ports or of ports on the Atlantic. If this occurs, moreover, it will be logical to expect diminished business for the transcontinental rail carriers, and dislocation in the traffic and rates on these railroads.

ATTITUDE OF INTERSTATE COMMERCE COMMISSION

Defenders of the policy of railroad discrimination in favor of goods carried in American vessels have taken the position that, though the law, when enforced, might tend to produce certain undesirable diversions of tonnage, such as the diversion of oriental freight from Seattle to Vancouver or from San Francisco to New York, both the Shipping Board and the Interstate Commerce Commission will take positive action to prevent such diversion. It is not clear what the Shipping Board will be able to do in such matters except to allocate vessels, and, possibly, to modify ocean rates. It is, however, plainly expected that the Interstate Commerce Commission will prevent oriental freight originating in the United States from leaving the continent via Canadian ports by refusing to allow American rail carriers to quote through or export rates on business so routed; it is also expected that the Commission will be called upon to exercise its power of embargo to check the diversion of freight from American to foreign ports or from ports in the western United States to ports in the eastern section of the country. This point of view is explicitly presented in a statement by Admiral Benson under date of July 2, 1920, from which the following extract is taken:

> The Interstate Commerce Commission is aware of the necessity for preventing the distorting of traffic upon the railroads of the United States such as would be accomplished by an effort by foreign carriers to divert the export and import traffic now

moving between Pacific Coast ports of the United States and the Orient, either to British Colombia or to ports of the Atlantic.

The movement of a certain share of the Oriental business over western American rail lines is necessary to prevent increased costs of transportation of foodstuffs between the West and the centers of population. . . . Any effort on the part of foreign carriers to accomplish the diversion of such business would be undoubtedly considered an "emergency" under which the Interstate Commerce Commission would act through absolute embargo, if necessary, to prevent such effort from being successful.

Surely no sane citizen of the United States in full possession of all the facts would be so unjust as to charge that any department of the Government would do other than take whatever action was necessary to protect the interests of the United States and maintain undisturbed the movements over American rail lines, the balancing of which is so essential to the public weal.

The position of Admiral Benson as set forth in the preceding paragraphs is understandable. It may be permitted, however, even to a "sane" person to doubt whether the Interstate Commerce Commission can control the movement of that great volume of traffic originating in the territory close to the Great Lakes and to the Canadian border, and, further, whether the Commission is ever likely deliberately to divert business from ports on the eastern seaboard solely in order to distribute it among other sections which for one reason or another may desire a share. Certainly this may be done if eastern terminals are unable to handle the freight; but inability of this sort is a temporary matter, and traders in the West frankly disbelieve in the willingness of any branch of the Government to force traffic out of its natural channels over any considerable period of time in order to protect the interests of any group of men.

Of some interest in this connection is the fact that the Tacoma Chamber of Commerce passed a resolution in August, 1920, requesting the Shipping Board to call upon the Interstate Commerce Commission to establish immediately and enforce an embargo against the movement of all freight through Atlantic and Gulf ports via the Panama Canal route to trans-Pacific ports, and to direct the movement of all such freight through Pacific Coast ports via the transcontinental railroads. The Shipping Board refused to comply with the resolution on the ground that the subject was one which should be taken up directly with the Interstate Commerce Commission.

When Congress passed the Merchant Marine Act, the prompt protests of western cities led, on June 14, to the suspension of section 28. This suspension was ordered by the Interstate Commerce Commission at the instance of the Shipping Board, and was to last for ninety days. Following up their original success, Pacific Coast shippers organized to secure a further suspension. An indefinite suspension with a long notice of withdrawal was preferred. There was talk of a conference between representatives of coast cities, and statistics were compiled showing that out of 258 trans-Pacific departures from Pacific Coast ports during the six months ending May 31, 1920, 124, or nearly one-half, had sailed under foreign flags. Nothing came of the proposed conference, and no meeting occurred between Admiral Benson and western shippers, but an additional suspension was secured until January 1, 1921, under such conditions that western men now (December, 1920) believe that there is no immediate likelihood of enforcement of the law. They are probably correct in this; certainly the expressions of Senator Jones and of Admiral Benson have been

emphatic to the effect that the disputed section will not be applied until American tonnage is adequate. In a formal statement on July 2, 1920 (already mentioned), Admiral Benson said:

> As section 28 is to be used only where there is ample American tonnage to handle the export commerce to any particular port in a foreign country . . . we can not conceive how anyone who has studied the law can assume that the Shipping Board would make any general application of this section.

A little over a month later Senator Jones told a group of port representatives at Tacoma, Washington, a very similar thing, namely, that he did not propose to drive foreign ships from American ports until there were American ships to take their places. Still another important expression of policy in this matter is to be found in the reply of the Shipping Board to the resolutions of the Tacoma conference requesting that the provisions of section 28 of the Merchant Marine Act be suspended indefinitely, and that six months' previous notice of the date of its effectiveness be given. The Board declined to comply with the resolution, but observed:

> You may be assured that the provisions of this section (section 28) will be administered by the Shipping Board with the utmost discretion, and that, as provided in the bill, they shall not be enforced unless and until adequate American shipping is available. In view of all this, it is felt that it is better to suspend the operation of this section from time to time, rather than to cause an indefinite postponement of its effectiveness.

There is some difficulty in determining whether the present conciliatory attitude of the Shipping Board is due to the vigorous protests of western shippers, or whether the policy now announced is the one which was in mind from the beginning. The absence of any public discussion of section 28 until after the Merchant Marine Act had been passed leaves the ordinary citizen in the dark in matters such as these. It does, however, seem reasonably probable that the clauses in the act relating to export and to import rates will not now become operative for a considerable time, and that when the section containing them is enforced the Shipping Board will proceed cautiously with full attention to the adequacy or inadequacy of American shipping at each and every port affected. I question whether the Shipping Board would have exercised the same degree of deliberation had the western communities been less well organized, and the grounds for their objections less forcibly presented. As a matter of fact, Pacific Coast cities believe that section 28 is dead, and no longer press their opposition to it. The section is not dead, yet it is to be hoped that the recent full discussion of its possibilities has lessened the danger that this law will be arbitrarily applied.